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News & Information

Office of the Commissioner

Contact: Kevin Smith 609/292-7832

Notice of Proposed New Regulation

Re: Proposed New Rule: N.J.A.C. 12:2 Public Access

Attached please find the above-referenced matter which was published in the July 1, 2002 *New Jersey Register*.

If you have any questions, please contact Frederick S. Cohen, Regulatory Officer I at 609-777-2960.

LABOR

(a)

THE COMMISSIONER

Public Access to Records

Proposed New Rules: N.J.A.C. 12:2

Authorized By: Albert G. Kroll, Commissioner, Department of Labor.

Authority: N.J.S.A. 47:1A-1 et seq. and 52:14B-3; and Executive Order No. 9 (Hughes 1963).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2002-223.

A public hearing on the proposed new rules will be held on the following date at the following location:

Monday, July 22, 2002
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor
13th Floor Auditorium
Trenton, New Jersey 08625

Please call the Office of Regulatory Services at (609) 292-7375 if you wish to be included on the list of speakers.

Submit written comments by August 30, 2002 to:

Frederick S. Cohen, Regulatory Officer
Office of Regulatory Services
New Jersey Department of Labor
PO Box 110-13th Floor, Suite G
Trenton, New Jersey 08625-0110
Fax (609) 292-8246

If you need this document in Braille, large print or audiocassette, contact the Office of Communications at (609) 292-2321 or NJ Relay (TTY) 1-800-852-7899.

The agency proposal follows:

Summary

On January 8, 2002, the Legislature passed and the Acting Governor approved P.L. 2001, c.404, known as the Open Public Records Act, which enacted changes in the law concerning public access to government records. The law will be effective July 7, 2002. This law expands the public's right of access to government records and facilitates the way in which that access is provided by the custodian of those records. Section 18 of the law authorizes public agencies to take anticipatory administrative action in advance as may be necessary for the smooth and efficient implementation of the Act. The Department of Labor proposes rules establishing the process by which members of the public may seek access to government records in the possession or control of the Department or agencies within the Department under the revised law. The Act requires the custodian of government records of a public agency to adopt a form for providing public access to government records. The proposed rules in Chapter 2 establish a process to be followed by members of the public who seek access to government records held or controlled by agencies within the Department.

The Act provides that all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c.73 as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Rules of Court; any Federal law, Federal regulation or Federal order. The Commissioner, pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), proposes to classify as exempt from public access certain records held or controlled by the Department or agencies within the Department. The act also provides that a public agency should be mindful of the need to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. The rules proposed in Chapter 2 are designed to serve both these legislative policies by facilitating public access to government records while, at the same time, balancing citizen's reasonable expectations of privacy and the integrity and effectiveness of governmental operations.

A summary of the proposed new rules follows:

Subchapter 1. Access to Government Records

Proposed new N.J.A.C. 12:2-1.1 states the scope and applicability of the rules contained in the subchapter. These new rules apply to agencies under the supervision of the Commissioner and those not under the supervision of the Commissioner, commonly known as "in but not of" agencies.

Proposed new N.J.A.C. 12:2-1.2 provides that the Commissioner will designate a person to be Department records custodian. This person will be the custodian of records for the Office of the Commissioner. Each division director or agency shall designate a custodian of records for that division or agency. The address of custodians of record are set out in this rule and will be made available to the public by posting on the Department website.

Proposed new N.J.A.C. 12:2-1.3 provides that all requests for access to government records under the public access to government records law must be on a form approved by the Department. The requester will be asked to provide certain information on the form, including a name, address and telephone number; a brief description of the records requested, type of access (examination, inspection or copying) and medium requested; and the requester's signature and date submitted to the proper custodian. The form will also provide space for: specific directions and procedures for requesting a government record; which records will be made available; when the record will be available; the fee to be charged; the amount of prepayment of fees that is required; a statement of the requester's right to challenge a denial and the procedures for challenging a denial; whether the requester has agreed to grant an extension of time; the toll free number of the Government Records Council; a certification by the requester that they have not been convicted of an indictable offense; the custodian to sign and date; and reasons if access is denied. Copies of the form will be available at division and agency offices and on the Department and agency website.

Proposed new N.J.A.C. 12:2-1.4 establishes the procedure for submitting requests for access to government records. Forms may be hand delivered during normal business hours, or mailed or transmitted electronically by facsimile or e-mail to the appropriate division or agency custodian. All requests must be delivered to the appropriate division or agency custodian of records in order to trigger the requirements of the public access to government records law. Upon receipt of the form, the custodian will review it for clarity and completeness and will advise the requester of any deficiencies or request additional information, provided the requester has included contact information. The requester's identity will be required in order to insure compliance with the provision of the law that prohibits a person convicted of an indictable offense under the laws of this State, any other state or the United States, from receiving personal information concerning the person's victim or the victim's family. Requests for records will be assigned a tracking number, if available, which will be used to track the request and respond to inquiries. The custodian will estimate the fee, including the cost of any special form of mailing requested. A request shall not be deemed complete until any prepayment required is received by the custodian. A requester will also be required to prepay any special mailing or delivery costs such as UPS or Express Mail. A requester will not be charged for ordinary mailing costs. There is no charge for merely inspecting records.

Proposed new N.J.A.C. 12:2-1.5 provides that the balance of any fee over and above the estimated prepaid fee is due on delivery of the record.

Proposed new N.J.A.C. 12:2-1.6 specifies the records for which a citizen is ordinarily entitled to immediate access. These documents include budgets, bills, vouchers, contracts and public employee salary and overtime information.

Proposed new N.J.A.C. 12:2-1.7 provides that, except as otherwise provided by law, if the custodian fails to grant access to a government record within seven business days after the custodian receives the completed request or such other time as may be required under the law or may be agreed upon, the failure will be deemed a denial of the request for access. As provided in the statute, a custodian need not respond to an anonymous request until the requester reappears before the custodian.

Proposed new N.J.A.C. 12:2-1.8 provides that if requested records are stored in an offsite storage facility outside of the regular business office of the agency, the custodian will advise the requester of the date the records will be available and the estimated cost within seven business days of receipt of the request form. This section codifies the requirements of the statute.

Proposed new N.J.A.C. 12:2-1.9 codifies the requirements of the statute concerning delivery of records in the medium requested. The custodian will deliver the record in the medium requested unless the agency does not maintain the record in that medium and cannot reasonably convert it. In such a case, the custodian will advise the requester of the cost of providing the record in the medium requested. Such charge may include labor.

Proposed new N.J.A.C. 12:2-1.10 deals with the computation of time. Consistent with statutes, court rules and case law, it provides that in computing the time period for granting access, the day the request is received is not included in the computation, but the last day of the period so computed is to be included. This section also clarifies that a request is not complete until all necessary information is provided by the requester and all applicable fees are paid.

Subchapter 2. Confidentiality of Records

Proposed new subchapter 2 contains a list of records deemed by the Commissioner to be confidential and not subject to public access under the provisions of N.J.S.A. 47:1A-1 et seq. as amended and supplemented. This subchapter is proposed under the authority of N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963). Under authority of the statute, that Executive Order authorized the head or principal executive of each principal department of State government to adopt and promulgate regulations setting forth which records of the department shall not be deemed public records. The regulations apply to all divisions within the department as well as those assigned or allocated to the department, commonly known as in, but not of, agencies. Proposed new N.J.A.C. 12:2-2.1 describes the scope and applicability of the subchapter.

Proposed new N.J.A.C. 12:2-2.2 sets forth those records of the Department that are not deemed government records for the purposes of N.J.S.A. 47:1A-1 et seq. as amended and supplemented. They are as follows:

(a) Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), be those records active, inactive or closed.

Release of such information would have a chilling effect on those individuals who would wish to lodge a complaint. That result would be contrary to public policy objectives which seek to obviate any vestiges of discrimination or on-the-job harassment of any sort from the workplace.

(b) Records of complaints and internal departmental investigations compiled in connection with an employee or arbitrator disciplinary proceeding, discharge, performance assessment evaluation, medical or psychiatric referral or other related counseling or activities, be those records active, inactive or closed.

Release of medical and psychiatric or other counseling records would violate an employee's reasonable expectation of privacy since release of such records is not contemplated under the amended Right to Know Law.

(c) Records pertaining to the collective bargaining process or those pertaining to attempts to encourage or reach a settlement of cases of any type pending before the Department or any of the entities allocated thereto.

(d) Records pertaining to labor arbitrations, mediations, fact-findings conducted or final agreements reached by the Department or any of the entities allocated to the Department including those conducted or overseen by the State Board of Mediation or Public Employment Relations Commission.

1. Records pertaining to the processing of representation petitions pending before the Public Employment Relations Commission that would divulge the identity of employees supporting or opposing representation petitions or would divulge how an employee voted.

Negotiations between union and management, whether in the form of collective bargaining or arbitration or mediation, cannot be conducted in an atmosphere where the details thereof are readily accessible to the public. Thus, the revelation of negotiating strategies would completely undermine the negotiating process and would be akin to a breach of an attorney/client privilege. Moreover, the latter position is also presently embodied in the Open Public Meetings Act at N.J.S.A. 10:4-12b(4). Additionally, as employees have a right to choose whether or not to support a given union which is seeking to represent them, they also must have a concomitant right to be protected against retaliation for supporting or not supporting a union.

(e) Information concerning individuals as follows:

1. Any records relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation of departmental employees;

2. Personal contact information created to facilitate employment-related communications;

3. Any records related to an individual's non-government employment history, except as necessary to demonstrate compliance with requirements for a particular departmental position;

4. Any records compiled as part of an inquiry into a person's or business entity's fitness to be granted or to retain a license, other than that person's or entity's disciplinary history with the Department;

5. Information in an income or other tax return; and

6. Information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness, except as otherwise required by law to be disclosed.

With regard to (e)1 above, all medical, psychiatric or psychological records of employees are subject to doctor/patient privilege and cannot be disseminated without the consent of the employee and treating practitioner. Unauthorized release of those records would constitute a grave ethical violation and serve to undermine the trust between patient and practitioner necessary to effectuate either an appropriate evaluation and/or treatment plan; per (e)2 above, the release of employee personal contact information would prove inimical to the general physical security and integrity of the employee. That information is maintained solely for the consultative use of the Department and, as such, does not conform to the definition of a "government record" accessible to the public; with regard to (e)3 above, release of an employee's non-governmental employment history, except to demonstrate compliance with the requirements for a particular departmental position, strikes a balance by acknowledging the latter as a governmental record for a limited, definable purpose, while generalized access would be denied; the (e)4 exemption above comes within the exception to the definition of a "government record" in that the records compiled as part of an inquiry into a person's or business entity's fitness to be granted or retain a license, other than the latter's disciplinary history with the Department, represents internal deliberative and consultative material. Those records may also trench directly upon a departmental investigative process or one undertaken in conjunction with criminal law enforcement authorities; the exemption of tax records embodied in the proposed (e)5 above comports with existing practices and applicable statutory exemptions and reflects the sensitivity assigned by government and society to the release of a citizen's personal financial information, while (e)6 above likewise codifies existing statutory exemptions and practices with regard to a variety of personal financial information untrammelled access to which would be inimical to the expectations of privacy which appertain thereto.

(f) Records pertaining to any matter in active litigation on behalf of or in defense of the Department, its divisions or allocated entities in any Federal or State court of competent jurisdiction. Litigation will be deemed to be active until the appellate process is exhausted.

Release of records pertaining to active litigation could result in (1) compromising the legal positions of the litigants; (2) the premature release of information which could have a negative impact on the ability of the Department to conduct its enforcement activities; (3) violate the due process rights of the parties by releasing information prejudicial to their respective causes before a final judgment has been rendered; (4) potentially violate the attorney/client privilege; and (5) impede the ability of the parties to enter into a settlement agreement. In addition, those litigation records which are compiled as a result of the Department's on-going attempts to enforce the laws within its jurisdictional ambit should be treated as those maintained by a "law enforcement agency" as defined in the amended Right to Know Law.

(g) No records maintained or information received by the Department pursuant to the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §2101 pertaining to plant closings and mass lay-offs of workers will be accessible to the public until such time as the plant closing or lay-off is announced to the affected workers 60 days before occurrence of the latter events.

1. The Department will not make accessible to the public the names, addresses, telephone numbers or any other personal data pertaining to those workers affected by a mass lay-off.

Premature release of WARN Act related information could result in vendors cutting off supplies to manufacturers and thereby undercutting the ability of a plant to function during the 60-day period prior to its closing. Thus, in turn, would impact the plant workers who could find themselves unemployed before the 60-day notification period has expired. Moreover, employers will often contact the Department in advance of implementation of the WARN Act provisions to discuss strategy regarding plant closings so as to cushion the impact thereof on the workers. Accessibility to that information would undermine the mitigating effects of the Act by undermining the ability of the business to continue to function during this pendency period. It would also affect the workers through a process of demoralization and that might, in turn, impact an orderly reemployment process, as well as continued plant operations. Lastly, no legitimate purpose would be served by releasing personal data regarding individual employees affected by a mass layoff. The impact would be negative and would serve to reveal information which could put a worker at public financial risk, that is, credit and servicing of personal

debt, while exposing him or her to the unwanted attentions of persons or businesses who might capitalize on his or her employment misfortune.

(h) Records concerning certain economic development information including, but not limited to, information related to an employer opening, relocation, expansion, closing, hiring and layoff activities collected by departmental employees in the course of their assigned duties.

(i) Any information gathered regarding an employer or provided to the Department by an employer which may, if revealed, give an advantage to a competitor of that employer.

(j) Test questions, scoring keys and other examination data pertaining to the administration of an examination or an application for public employment or licensing.

(k) Records of another department or agency allocated to that department in the possession of this Department or any agency allocated to this Department when those records are made confidential by a regulation of that department or agency allocated to that department adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the Department or agency to make records confidential or exempt from disclosure.

(l) Records of this Department or any agency allocated to this Department held by the Office of Technology (OIT), The State Records Storage Center of the Division of Archives and Record Management (DARM), in the Department of State, or an offsite storage facility outside of the regular business office of the agency. Such records shall remain the legal property of this agency and be accessible for inspection or copying only through a request to the proper custodian of this Department or agency allocated to this Department. In the event that records of this Department or any agency allocated to this Department have been or shall be transferred to and accessioned by the State Archives in the Division of Archives and Records Management, all such records shall become the legal property of the State Archives, and requests for access to them shall be submitted directly to the State Archives.

Economic development data would, if released, give an unfair advantage to a business competitor or, as noted in the proposed exception referencing the WARN Act, undermine the orderly processes attendant to a plant closing and mass lay-off. Moreover, access to test questions, scoring keys and other examination data pertaining to the administration of an examination or applications for public employment or licensing would compromise the integrity of the latter processes thereby opening them up to corruptive abuse which is antithetical to the concept of a level playing field inherent therein. Similarly, the Department, like other State agencies, is bound to respect those regulations promulgated by other agencies of government which are deemed to be of a confidential nature by that sister agency. Codification thereof comports with the intent of both the Open Public Records Act and existing practice, as well as with Executive Order No. 9 (Hughes 1963). Conversely, Departmental records which are held by the Office of Technology, the State Archives or in an offsite storage facility outside of the Department's regular business offices will be, if not of a recognized confidential nature, as embodied in statute or regulation, accessible to the public. However, those records which are transferred to the State Archives for permanent storage, will thereby become the property thereof. Thus, requests for permanently archived documents will have to be directed to the state archives and not to the Department.

Because a 60-day comment period has been provided on this notice of proposal, this notice is excepted from the rulemaking calendar requirement of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules implement the requirements of N.J.S.A. 47:1A-1 et seq. as amended and supplemented by P.L. 2001, c.404. The proposed new rules will have a positive social impact by establishing a procedure for public access to government records held or controlled by the Department of Labor. The law requires that government records be readily accessible for inspection, copying or examination by citizens of this State unless exempt by law or regulation, but also calls upon a public agency to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. These proposed new rules attempt to balance the competing policies in the statute and to exclude records where it would not be in the public interest to permit indiscriminate disclosure or copying of certain records as set forth in the above explication of subchapter 2.

Economic Impact

The proposed new rules will not have an economic impact on the public in excess of that provided by the statute. Persons requesting copies of

government records will be required to pay the fees authorized by the statute for copies of records. The proposed rules do not impose any additional costs. The cost incurred will depend on the type and volume of records requested and the medium of delivery.

The Department, however, will incur costs in processing requests for access to government records in the time set by the Act.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are not subject to any Federal standards. The Federal Freedom of Information Act, 5 U.S.C. §§550a et seq., does not apply to records of State government and does not constitute a Federal standard.

Jobs Impact

The proposed new rules will not have an impact on the number of jobs generated or lost in the private sector in New Jersey. They may, however, require public agencies in this State to increase the number of employees designated to respond to requests for public access.

Agriculture Industry Impact

The proposed new rules will not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

The proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules impose compliance requirements on all persons seeking access to government records pursuant to N.J.S.A. 47:1A-1 et seq. as amended and supplemented. All persons, including small businesses, will be required to submit requests for access to government records on a form approved by the Department. The statute requires the custodian of records to adopt a form for access to records. The statute authorizes fees for copies of government records. There is no exception for small businesses. The cost depends on the number of copies requested. The proposed new rules provide that the fee will be the maximum set forth in the statute or a fee authorized by the statute that does not exceed the actual cost of providing the record. The cost to the Department of providing the record does not depend on whether the requester is a small business.

Smart Growth Impact

The proposed new rules will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.